IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

GEORGE J. HUBER,	:	APPEAL NO. C-150586 TRIAL NO. A-1308254
Plaintiff-Appellant,	:	
vs.	:	*JUDGMENT ENTRY.*
STEPHEN BUEHRER, ADMINISTRATOR, OHIO BUREAU OF WORKERS' COMPENSATION,	:	
and	:	
MARK MADISON COMPANY, INC.,	:	
Defendants-Appellees.		

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* S.Ct.R.Rep.Op. 2; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Plaintiff-appellant George J. Huber appeals the judgment of the Hamilton County Common Pleas Court denying him the right to participate in the workers compensation fund.

Huber was injured when he was struck by an automobile while crossing a public street near his worksite at the Herald Building. He filed a claim with the Bureau of Workers' Compensation, which was denied. He appealed the disallowance to the common pleas court. Huber's case proceeded to a bench trial on the issue of whether the right-knee contusion he had sustained when he was struck by a car while

crossing the public street had been sustained "in the course of" and "arising out of" his employment with defendant-appellee Mark Madison Company, Inc., ("Mark Madison"). At the conclusion of the trial, the common pleas court found in favor of the Bureau of Workers' Compensation and Mark Madison. At Huber's request, the trial court entered findings of fact and conclusions of law. The trial court found that Huber's injury had not been sustained "in the course of" and "arising out of" his employment at Mark Madison Company, Inc. because he had been injured when he had been struck by a car on a public street during a paid break while on a personal errand.

In a single assignment of error, Huber argues that the trial court erred as a matter of law in determining that he was not injured "in the course of" and "arising out of" his employment with Mark Madison. We disagree.

Huber first argues that he was a transient employee, who was not subject to the coming-and-going rule. *See MTD Prods., Inc. v. Robatin*, 61 Ohio St.3d 66, 572 N.E.2d 661 (1991), syllabus. But the record reflects that Huber had reported to the same job site for two months prior to his injury, and that he worked fixed hours daily at that job site. Thus, contrary to his assertions, the record reflects that he was a fixed-situs employee, subject to the coming-and-going rule. *See Ruckman v. Cubby Drilling*, 81 Ohio St.3d 119, 120, 689 N.E.2d 917 (1998) (holding that employment which calls for periodic relocation of job sites on a daily, weekly, or monthly basis may constitute fixed-situs employment).

Huber argues, nonetheless, that the trial court erred by failing to apply the personal-comfort doctrine and two exceptions to the coming-and-going rule: the zone-of-employment and special-hazard exceptions. We agree, however, with the

Second Appellate District that the general personal-comfort doctrine is superceded by the more specific coming-and-going rule. *See Jobe v. Conrad*, 2d Dist. Montgomery No. 184592001, 2001 Ohio App. LEXIS 228, *5-6 (Jan. 26, 2001). As a result, we cannot conclude the trial court erred in failing to apply the personal-comfort doctrine.

Nor can we conclude that the trial court erred by failing to conclude that Huber was within the zone of employment at the time of his injury. Huber was injured when he was struck by an automobile on a public street near his job site while he was on a personal errand to get a soda. There is no evidence in the record that this area was under the control of Mark Madison. *See Merz v. Indus. Comm.*, 134 Ohio St. 36, 39, 15 N.E.2d 632 (1938) (defining the zone of employment as "the place of employment and the area thereabout, including the means of ingress thereto and egress therefrom, under the control of the employer.").

Likewise, the trial court did not err by failing to apply the special-hazard exception. *See MTD Products, Inc.*, 61 Ohio St.3d at 68, 572 N.E.2d 661. Even if Huber met the first part of the exception—he was not in the roadway, but for his employment—he did not demonstrate the second part of the exception—that the risk from which his injury resulted was any different or was greater than the risk to the general public. Huber faced the same risk of being struck and injured by a motorist as any other person crossing the street that day. *See id.*; *Johnston v. Case W. Res. Univ.*, 145 Ohio App.3d 77, 84-85, 761 N.E.2d 1113 (2001).

Nor did Huber demonstrate that he had satisfied the totality-of-the-circumstances test. *See Friebel v. Visiting Nurses Assn. of Mid-Ohio*, 142 Ohio St.3d 425, 2014-Ohio-4531, 32 N.E.3d 413, ¶ 14. Although the accident occurred

proximate to Huber's place of employment, Mark Madison did not exercise any control over the public street where Huber was struck by the automobile and it did not gain any benefit by Huber's presence in the street at the time of the collision. Thus, Huber failed to satisfy the second and third prongs of the totality-of-the-circumstances test. *See Liddic v. Trimble*, 2d Dist. Montgomery No. 17552, 1999 Ohio App. LEXIS 2275, *11 (May 21, 1999). Because the trial court correctly determined that Huber's injury did not "arise out of" his employment with Mark Madison, we need not determine whether his injury was sustained "in the course of" his employment. *See Fisher v. Mayfield*, 49 Ohio St.3d 275, 277, 551 N.E.2d 1271 (1990) (holding that an employee must satisfy both "in-the-course-of" and "arising-out-of" tests to participate in the workers' compensation fund.) We, therefore, overrule Huber's sole assignment of error and affirm the judgment of the trial court.

Further, a certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

FISCHER, P.J., HENDON and **STAUTBERG, JJ.**

To the clerk:

Enter upon the journal of the court on June 1, 2016

per order of the court _____.

Presiding Judge